Lee Ah Kong v Leong Koo

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-04-54-1994
NH CHAN, MAHADEV SHANKAR AND VC GEORGE JJCA
7 MARCH 1996

Civil Procedure *— Subordinate court — Default judgment — Absence of defendant and his counsel — Sessions Court proceeded to hear oral testimony from plaintiff and reserved judgment — Application of defendant to reopen case — Resisted by plaintiff's counsel — Full argument at hearing — Sessions court dismissed application and gave judgment to plaintiff — Whether constituted default judgment under O 28 r 6 of Subordinate Courts Rules 1980 — Subordinate Courts Rules 1980 Or 28 r 6*

On 12 April 1985, Mdm Leong Koo ('the purchaser') entered into a sale and purchase agreement ('the agreement') to buy a piece of land free of all encumbrances from Chai Min Kee Holdings Sdn Bhd ('the vendor') for RM480,000. The purchaser paid 10% as deposit and part payment of the purchase price ('the deposit sum'). The vendor, however, had charged the land to Public Bank ('the bank') for a loan which was well in excess of the purchase price, and the bank had accordingly lodged a caveat on the land. It was evident that the deposit sum had to be used to pay the bank, and that the vendor had to make up the balance required. In these circumstances, the purchaser's solicitors expressly stipulated in their letter to the vendor's solicitors ('Lee') that they were forwarding their cheque made out in favour of Lee's firm for RM48,000 being deposit 'on your undertaking to hold the same as stakeholder'. Completion did not take place within the time provided by reason of the vendor's default. By letter dated 5 August 1985, the purchaser's solicitors demanded the deposit sum from Lee, but Lee failed to return it. The purchaser filed a suit in the sessions court, naming Lee as the first defendant, and the vendor as the second defendant. A default judgment was obtained against the vendor on 2 April 1988, against which there was no appeal. Lee, however, filed a defence, in which he contended that his duties as a stakeholder terminated with the execution of the agreement by the vendor, and that thereupon he was free to release the deposit sum. The trial was fixed for 4 August 1990, but both Lee and his counsel did not turn up. The sessions court judge proceeded to hear oral testimony from the purchaser and her solicitors and reserved judgment to 9 August 1990. On 8 August 1990, Lee filed a written application for an order that a date be fixed for the defence to be heard, and that 9 August 1990 be vacated as the date fixed for judgment ('the first application'). In the supporting affidavit, Lee's counsel stated that she was caught in a traffic jam and only arrived in court at 12.20pm. On 9 August 1990, hearing of the first application was adjourned to 8 October 1990. On 8 October 1990, Lee's counsel

requested that the case be reopened, but the purchaser's counsel resisted on the ground that Lee's explanation was not satisfactory, and that there was no affidavit as to merits. There were full arguments, and the matter was adjourned to 7 November 1990, when Lee's application was dismissed, and the vendor was given judgment for RM48,000 with interest and costs. Against these decisions, Lee filed a second application on 20 November 1990 for the 'default judgment' of 7 November 1990 to be set aside and for a stay of execution ('the second application'). In parallel with this application to set aside, Lee had filed a notice of appeal dated 13 November 1990 against the decision given on 7 November 1990 ('the first appeal'). The second application was fully argued on 15 May 1991 both as to the reasons for the absence of Lee and his counsel on 4 August 1990 and whether there were any merits in the defence. The sessions judge took time for consideration and on 13 June 1991, the second application was also dismissed with costs. Against this decision, Lee filed a notice of appeal on 19 June 1991 ('the second appeal'). Both appeals were taken together by the judicial commissioner who dismissed the appeals. Lee appealed to the Court of Appeal.

Held, dismissing the appeal:

(1) It was obvious that Lee's case was devoid of any prospect of success. In support of the first application, Lee did not explain why he was absent and no merits were urged (see p 236H).

(2) It was incorrect to say that the judgment given on 7 November 1990 was a 'default judgment'. Even though Lee had by his own conduct precluded himself from giving evidence at the trial, the fact was that the decision given on 7 November 1990 was inter partes after counsel for both parties had fully argued their respective positions. Thus, the second application filed by Lee to set aside an alleged 'default judgment' was wholly misconceived. It should have been struck out *in limine* especially as the first appeal was already pending (see pp 236H–I and 237A).

(3) Order 28 r 6 of the Subordinate Courts Rules 1980 ('the SCR') has been so worded as to give the court an option either to give a judgment in default of the presence of the defendant and his counsel, or to make any other order as it thinks just, which would include the power to require the plaintiff to give evidence in support of his claim before judgment is given (see p 237D); *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 followed.

(4) Whether a court should give a default judgment at the trial without requiring evidence under O 28 r 6 in a particular case calls for the exercise of a judicial discretion. In the present case, the sessions judge required evidence to be led. He did not give a

default judgment. His refusal to reopen the case after he had reserved judgment was an exercise of discretion which was quite proper, because on both counts Lee had failed to discharge the onus upon him, namely, to give a reasonable excuse in the first application for his absence, and to show merits (see p 237E–F).

Per curiam:

In the High Court, a defendant who is served merely enters an appearance and files a defence (or a defence and a counterclaim) after he is served with a statement of claim. Judgments can be obtained in default of appearance or in default of defence. Once the pleadings are closed, evidence has to be led before judgment is obtained at the trial in the absence of the defendant. However, in the subordinate courts, the prescribed form of notice of appearance, ie Form 2, O 5 r 2 of the Subordinate Court Rules 1980 ('the SCR'), requires the defendant who has been served to state whether he admits or disputes the claim, and by O 14 r 5 of the SCR, he can file and serve his defence *before* the return day or within such time as the court may direct on the return day (see p 237B–C).

[Bahasa Malaysia summary

Pada 12 April 1985, Puan Leong Koo ('pembeli') telah mengikat suatu perjanjian jual beli ('perjanjian tersebut') untuk membeli sebidang tanah yang bebas daripada semua bebanan daripada Chai Min Kee Holdings Sdn Bhd ('penjual') pada harga RM480,000. Pembeli telah membayar 10% sebagai deposit dan sebahagian bayaran harga belian ('jumlah deposit'). Namun demikian, penjual telah menggadai tanah itu kepada Public Bank ('bank tersebut') bagi suatu pinjaman yang jauh melebihi harga belian, dan ekoran itu, bank tersebut telah mengkaveatkan tanah itu. Adalah jelas bahawa jumlah deposit harus digunakan bagi membayar bank tersebut, dan bahawa penjual terpaksa membayar baki yang perlu. Dalam keadaan ini, peguamcara pembeli telah mensyaratkan secara nyata dalam surat mereka kepada peguamcara penjual ('Lee') bahawa mereka akan mengirim cek atas nama syarikat Lee untuk jumlah RM48,000 sebagai deposit 'atas akujanji anda untuk memegang deposit tersebut sebagai pemegang amanah harta'. Penyelesaian tidak sempurna dalam tempoh masa yang diperuntukkan atas sebab keingkaran penjual. Melalui surat bertarikh 5 Ogos 1985, peguamcara pembeli telah menuntut jumlah deposit daripada Lee, tetapi Lee gagal memulangkannya. Pembeli telah memfailkan suatu guaman di mahkamah sesyen, dan menamakan Lee sebagai defendan pertama, dan penjual sebagai defendan kedua. Suatu penghakiman ingkar telah diperolehi terhadap penjual pada 2 April 1988 dan tiada rayuan dibuat. Walau bagaimanapun, Lee telah memfailkan suatu pembelaan, di mana dia berhujah bahawa tugasnya sebagai pemegang amanah harta telah

tamat apabila penjual melaksanakan perjanjian tersebut, dan bahawa dia bebas melepaskan jumlah deposit selepas itu. Perbicaraan telah ditetapkan untuk 4 Ogos 1990, tetapi kedua-dua Lee dan peguamnya tidak hadir. Hakim mahkamah sesyen terus mendengar keterangan lisan daripada pembeli dan peguamcaranya dan telah menangguhkan penghakiman ke 9 Ogos 1990. Pada 8 Ogos 1990, Lee memfailkan suatu permohonan bertulis bagi perintah bahawa satu tarikh ditetapkan supaya pembelaan didengar, dan bahawa 9 Ogos 1990 telah dilapangkan sebagai tarikh ditetapkan untuk penghakiman ('permohonan pertama'). Dalam afidavit menyokong, peguamcara Lee menyatakan bahawa beliau telah tersangkut dalam kesesakan lalu lintas dan hanya tiba di mahkamah pada pukul 12.20 tengahari. Pada 9 Ogos 1990, pembicaraan permohonan pertama telah ditangguh ke 8 Oktober 1990. Pada 8 Oktober 1990, peguamcara Lee meminta agar kes dibuka semula, tetapi peguamcara pembeli telah menentang atas alasan bahawa penjelasan Lee tidak memuaskan, dan bahawa tiadanya afidavit mengenai merit. Terdapatnya penghujahan penuh, dan perkara itu telah ditunggah ke 7 November 1990, apabila permohonan Lee ditolak, dan penjual diberi penghakiman untuk RM48,000 dengan faedah dan kos. Lee telah memfailkan permohonan kedua pada 20 November 1990 terhadap keputusan ini supaya 'penghakiman ingkar' bertarikh 7 November 1990 diketepikan dan untuk satu penggantungan pelaksanaan ('permohonan kedua'). Bersama dengan permohonan ini untuk mengetepi, Lee telah memfailkan satu notis rayuan bertarikh 13 November 1990 terhadap keputusan yang diberikan pada 7 November 1990 ('rayuan pertama'). Permohonan kedua telah dihujahkan dengan sepenuhnya pada 15 Mei 1991 berkaitan kedua-dua alasan untuk ketidakhadiran Lee dan peguamnya pada 4 Ogos 1990 dan sama ada terdapat sebarang merit dalam pembelaan. Hakim sesyen telah mengambil masa untuk pertimbangan dan pada 13 Jun 1991, permohonan kedua juga telah ditolak dengan kos. Lee memfailkan satu notis rayuan terhadap keputusan ini pada 19 Jun 1991 ('rayuan kedua'). Kedua-dua rayuan telah didengar bersama oleh pesuruhjaya kehakiman yang menolak rayuan-rayuan. Lee merayu kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan itu:

(1) Adalah jelas bahawa kes Lee tidak mempunyai sebarang prospek kejayaan. Sebagai menyokong permohonan pertama, Lee tidak menjelaskan mengapa dia tidak hadir dan tiada merit telah ditegaskan (lihat ms 236H).

(2) Adalah tidak betul untuk mengatakan bahawa penghakiman yang diberi pada 7 November 1990 merupakan suatu 'penghakiman ingkar'. Walaupun Lee telah mengecualikan dirinya daripada memberi keterangan di perbicaraan menerusi kelakuannya sendiri, pada hakikatnya keputusan yang diberi pada 7 November 1990 adalah inter partes selepas peguam bagi kedua-dua pihak telah menghujahkan kedudukan masing-masing dengan sepenuhnya.

A Justeru itu, permohonan kedua oleh Lee untuk mengetepikan 'penghakiman ingkar' yang dikatakan adalah salah tanggap pada keseluruhannya. Ia seharusnya dibatalkan *in limine* terutamanya kerana permohonan pertama sedang pun menunggu penyelesaian (lihat ms 236H–I dan 237A).

B (3) Aturan 28 k 6 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') disusun sedemikian supaya memberi opsyen kepada mahkamah sama ada memberi satu penghakiman ingkar kehadiran defendan dan peguamnya, atau untuk membuat apa-apa perintah lain sebagaimana yang difikirkannya adil, yang akan termasuk kuasa untuk menghendaki plaintif memberi keterangan menyokong C tuntutannya sebelum penghakiman diberi (lihat ms 237D); *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 diikut.

(4) Sama ada sebuah mahkamah patut memberi satu penghakiman ingkar di perbicaraan tanpa menghendaki keterangan di bawah D A 28 k 6 dalam suatu kes yang tertentu memerlukan pelaksanaan budi bicara kehakiman. Dalam kes ini, hakim sesyen telah menghendaki supaya bukti dikemukakan. Beliau tidak memberi penghakiman ingkar. Penolakan beliau untuk membuka semula kes itu selepas menangguhkan penghakiman adalah satu E pelaksanaan budi bicara yang agak wajar, kerana Lee telah gagal mendiscajkan beban yang diletakkan di atasnya untuk kedua-dua perkara, iaitu untuk memberi alasan munasabah dalam permohonan pertama bagi ketidakhadirannya, dan untuk menunjukkan merit (lihat ms 237E–F).

F **Per curiam:**

Di Mahkamah Tinggi, defendan yang telah disampaikan hanya perlu memasukkan kehadiran dan memfail pembelaan (atau suatu pembelaan dan tuntutan balas) selepas dia disampaikan dengan satu pernyataan tuntutan. Penghakiman ingkar kehadiran dan G penghakiman ingkar pembelaan boleh diperolehi. Selepas pliding ditutup, keterangan harus dikemukakan sebelum penghakiman diperolehi di perbicaraan dalam ketidakhadiran defendan. Namun demikian, di mahkamah rendah, bentuk notis kehadiran yang ditetapkan, iaitu Borang 2, A 5 k 2 KMR, menghendaki defendan yang telah disampaikan untuk menyatakan sama ada dia mengakui H atau mempertikaikan tuntutan itu, dan menurut A 14 k 5 KMR dia boleh memfail dan menyampaikan pembelaan *sebelum* hari kembalian atau dalam suatu tempoh masa sebagaimana yang diarahkan oleh mahkamah pada hari kembalian (lihat ms 237B–C).]

I **Notes**

For cases on default judgments entered by the subordinate courts, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1862, 3183–3186.

Case referred to

Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd [1982] 2 MLJ 79

Legislation referred to

Rules of the High Court 1980 O 5 r 2, O 25 r 1(4), O 28 r 6, r 8(1), (2), O 29 r 14, O 43, O 45 r 5, r 6

Subordinate Courts Rules 1980 O 14 r 5, O 28 r 6

Appeal from: Appeal Nos 12–17–91 and 12–27–91 (High Court, Johor Bahru)

Vijay Kumar Natarajan (*AK Lee & Co*) for the plaintiff.

Foo Yet Ngo, Dhinesh Bhaskaran (*Shearn Delamore & Co*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): This is an appeal against the decision of the High Court, Johor Bahru.

The appellant ('Lee') is an advocate and solicitor. On 12 April 1985, Mdm Leong Koo ('the plaintiff') entered into a sale and purchase agreement ('the said agreement') to buy a piece of land from Chai Min Kee Holdings Sdn Bhd ('the vendor'). The land was then charged to the Public Bank ('the bank') and there was a caveat on the land. The vendor had contracted to sell the land free of all encumbrances. The price was RM480,000. Clause 1 of the said agreement provided for the payment of 10% as deposit and part payment of the purchase price.

The amount owing to the bank was well in excess of the purchase price. It was evident that this had to be used to pay the bank, and that the vendor had to make up the balance required. In these circumstances, the plaintiff's solicitors expressly stipulated in their letter dated 11 April 1985 to Lee who acted as the vendor's solicitors that they were forwarding their cheque made out in favour of Lee's firm for RM48,000 being deposit 'on your undertaking to hold the same as stakeholder'.

Completion did not take place within the time provided by reason of the vendor's default, and by letter dated 5 August 1985 the plaintiff's solicitors demanded the return of all money paid to Lee, but Lee failed to return the RM48,000. So, the plaintiff filed a suit in the Sessions Court, Johor Bahru. As against Lee as the first defendant, she claimed the return of the RM48,000, and as against the vendor as second defendant, she made a claim in the alternative for the same amount as damages. There was also a claim for interest and costs.

A default judgment was obtained against the vendor on 2 April 1988, against which there is no appeal.

Lee filed a defence in which he contested his liability to refund the RM48,000, on the basis that his duties as a stakeholder only remained

A effective until the moment the vendor executed the said agreement and that thereupon he was free to release the RM48,000. In para 6 of his defence, Lee averred that he had in fact released the money to the vendor on 12 April 1985.

The trial was fixed for 4 August 1990. The same date was assigned
B for the hearing of an application filed by Lee said to be under O 25 r 1(4) of the Rules of the High Court 1980. It is common ground that Lee's counsel, Miss Chan Chui Tin had earlier requested the vendor's counsel, Mr Nathan, that the case be stood down till 10am because she was coming from Kuala Lumpur. By 10.30am, neither of them had turned up. Nor was there any explanation for their respective absences.

C Order 28 rule 6 of the Subordinate Courts Rules 1980 ('the SCR') reads as follows:

> 6(1) If, when an action, other than actions to which Orders 43, and 45 apply, is called for hearing, the plaintiff appears but the defendant does not appear, the Court may:
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> D
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> (a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim; and
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> (b) if the defendant has a counterclaim, dismiss the counterclaim with costs; and
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> E make any other order as it thinks just.

(Orders 43 and 45 refer to actions by or against government and moneylenders actions). The sessions court judge then proceeded to hear oral testimony from the plaintiff and her solicitors who had conduct of the matter, and reserved judgment to 9 August 1990.

F What Miss Chan or Lee did immediately after their arrival in court on the 4 August 1990 is not known. On 8 August 1990, however, a written application was filed by Lee, for an order that a date be fixed for the defence to be heard and that 9 August 1990 be vacated as the date fixed for judgment.

G This application was supported by an affidavit of Miss Chan affirmed on 7 August 1990. In it, she stated that she had got in a traffic jam at Kulai and only arrived in court at 12.20pm. She asked for another date to be fixed for the defendant to be heard since the matter had not yet been disposed of. Nothing was said in this affidavit as to merits. Nor was there any affidavit from Lee to explain his absence.

H Thus, on 9 August 1990, in the presence of other counsel mentioning the matter for each party, the application filed was adjourned to the 8 October 1990 for disposal. On that day, Miss Chan submitted that she was held up at Tampoi (not Kulai as alleged earlier) and asked that the case be reopened. Plaintiff's counsel resisted on the ground that the explanation
I was not satisfactory and that there was no affidavit as to merits. There were full arguments, and the matter was adjourned to the 7 November 1990 when the defendant's application was dismissed with costs and the vendor was given judgment for RM48,000 with interest and costs.

We referred earlier to O 28 r 6 of the SCR. We should now refer to O 28 r 8(1) and (2) and O 29 r 14 of the SCR. They read as follows:

> 8(1) Any judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just.
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> (2) An application under this rule shall be subject to Order 29, rule 14.
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> 14 Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or tovary such order or judgment must make his application to the Court and serve it on the party who was obtained the judgment within 30 days after the receipt of the order or judgment.

Against these decisions, Lee filed a second formal application on 20 November 1990 for the 'default judgment' of 7 November 1990 to be set aside and for a stay of execution. Lee now swore a supporting affidavit on 13 November 1990. Again, he urged the same grounds for being late for court on 4 August 1990. He claimed that he had released the RM48,000 when the vendor signed the agreement, but gave no independent evidence to support this. He contended that his duties as a stakeholder for the deposit terminated with the execution of the said agreement by the vendor. This application was vigorously resisted by the purchaser's solicitors whose affidavit in response to Lee's goes into some detail on the factual history and the legalities of this matter. In parallel with this application to set aside, Lee had filed a notice of appeal dated 13 November 1990 against the decision given on 7 November 1990. Notwithstanding the tendency of this appeal, the second application was fully argued on 15 May 1991 both as to the reasons for the absence of Lee and Miss Chan on 4 August and whether there were any merits in the defence. The sessions judge took time for consideration and on 13 June 1991, the second application was also dismissed with costs. Against this decision, Lee filed a notice of appeal on the 19 June 1991.

The learned sessions judge gave a reasoned judgment and both appeals were taken together by the learned judicial commissioner whose decision to dismiss both appeals is supported by a very careful and comprehensive judgment. We entirely agree with both these concurring judgments.

It is manifestly obvious that Lee's case is devoid of any prospect of success. In support of the first application made on 8 August 1990, Lee did not explain why he was absent and no merits were urged. We do not think it correct to say that the judgment given on 7 November 1990 was a 'default judgment'. Even though Lee had by his own conduct precluded himself from giving evidence at the trial the fact is that the decision given on 7 November 1990 was inter partes after counsel for both parties had fully argued their respective positions.

In our view, the second application filed by Lee to set aside an alleged 'default judgment' was wholly misconceived. It was a misguided attempt to obtain a second bite at the cherry, and should have been struck

A out *in limine* especially as the first appeal was already pending. But in all the circumstances of this case, the point is one of academic interest.

There are significant differences between procedure in the High Court and the subordinate courts. In the High Court, a defendant who is served merely enters an appearance and files a defence (or a defence and
B counterclaim) after he is served with a statement of claim. Judgments can be obtained in default of appearance or in default of defence. Once the pleadings are closed, evidence has to be led before judgment is obtained at the trial in the absence of the defendant.

In the subordinate courts, however, the prescribed form of notice of
C appearance (Form 2, O 5 r 2) requires the defendant who has been served to state whether he admits or disputes the claim, and by O 14 r 5 of the SCR, he can file and serve his defence *before* the return day or within such time as the court may direct on the return day.

Order 28 r 6 of the SCR has been so worded as to give the court an option either to give a judgment in default of the presence of the defendant
D and his counsel [see *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79] or to make any other order as it thinks just; which would include the power to require the plaintiff to give evidence in support of his claim before judgment is given. That the court can give a default judgment at the trial without requiring evidence can be seen when a
E comparison is made with O 45 rr 5 and 6 which require leave of the court before a judgment is entered in default appearance. But whether it should do so under O 28 r 6 in a particular case calls for the exercise of a judicial discretion. In the present case, the sessions judge required evidence to be led. He did not give a default judgment. His refusal to reopen the case after he had reserved judgment was an exercise of discretion which was
F quite proper because on both counts Lee had failed to discharge the onus upon him namely to give a reasonable excuse in the first application for his absence, and to show merits.

In the light of what we have said, this appeal is dismissed with costs. The deposit will be paid out to the respondent towards her taxed costs.

G *Order accordingly.*

Reported by TA Loh

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